

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) 1:97-cr-5220 OWW LJO  
Plaintiffs, ) 1:01-cv-5938 OWW LJO  
v. ) ORDER DENYING MOTION TO  
THEODORE RICHARD III, ) VACATE, SET ASIDE OR  
Defendants. ) CORRECT SENTENCE  
\_\_\_\_\_  
)

This case is before the Court on the Petition of Theodore Richard III, a federal prisoner, who filed a motion for relief to vacate, set aside, or correct the sentence imposed pursuant to the provisions of 28 U.S.C. § 2255. Petitioner attacks his sentence pronounced February 19, 1999, of 168 months in custody following a jury verdict on November 12, 1998, finding him guilty of the crime of conspiracy to distribute and possess with the intent to distribute cocaine base.

The Magistrate Judge filed Findings and Recommendations on November 8, 2005, exhaustively analyzing all issues raised by Petitioner with meticulous detail to the trial record and the extended evidentiary hearing and sentencing proceedings held over two days, culminating in the February 19, 1999, sentence.

1       The Court has considered, *de novo*, the Petition, all issues  
2 presented, and the Magistrate Judge's Findings and  
3 Recommendations. None of the issues raised justify any change in  
4 Petitioner's conviction or sentence. He has withdrawn his claim  
5 that he was unconstitutionally sentenced based upon *Blakely v.*  
6 *Washington*, 542 U.S. 296 (2004), in light of *United States v.*  
7 *Booker*, 125 S.Ct. 738 (2005). Neither the *Blakely* standards nor  
8 developments in the law following the 1998 conviction and 1999  
9 sentence retroactively apply to this case. *United States v.*  
10 *Cruz*, 423 F.3d 1119, 1120 (9th Cir. 2005) (the rule announced by  
11 *Booker* and *Blakely* does not operate retroactively). This is not  
12 a pending sentencing case. *United States v. Ameline*, 409 F.3d  
13 1073 (9th Cir. 2005) (en banc). *Ameline* does not apply. *United*  
14 *States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005),  
15 cert. denied, 2005 WL 292683 (Nov. 07, 2005) (*Ameline* limited  
16 remand applies to pending direct criminal appeals).

17 The Magistrate Judge has accurately analyzed the trial  
18 record and the detailed record of the extended sentencing  
19 proceedings. There is no error. The Petitioner's motion to  
20 Vacate, Set Aside, Correct Sentence under 28 U.S.C. § 2255 is  
21 DENIED.

22 || SO ORDERED.

23 || DATED: November 22, 2005.

/s/ OLIVER W. WANGER

Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

**ORDER DENYING CERTIFICATE OF APPEALABILITY**

For the reasons stated in the Findings and Recommendations of the Magistrate Judge, and above, no issue debatable among jurists of reason is presented and accordingly, no certificate of appealability shall issue.

**SO ORDERED.**

**DATED:** November 22, 2005.

/s/ OLIVER W. WANGER

Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE